"(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly--

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

STATEMENT OF THE CASE

Petitioner was indicted, tried and convicted along with a number of corporate insiders of violating section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a) in the sale of Air and Space Underwriters, Inc. common stock. Petitioner was an insurance salesman who sold the stock to several of his customers.

The very evening the jury was empaneled one of Petitioner's co-defendants telephoned a business associate of a juror and asked whether the juror was likely to be prejudiced against the co-defendant because the juror, a banker, had refused to make a business loan to the co-defendant. The business associate informed the juror of the communication who in turn informed the trial judge. (A. 609-611)*

The trial judge informed counsel of the contact, refused to grant a mistrial, allowed the tainted juror to sit, and elected to discuss the matter with all of the jurors, notwithstanding the tainted juror's representation that he had not told the others of the episode and his promise not to do so (A. 616-17). The judge told the other jurors the contact had taken place, that it was

*The appendix in the Court of Appeals is referred to in this petition as "A". The record in the Court of Appeals is referred to in this petition as "R".

an impropriety and an irregularity, and that it should not have been made. The other jurors were not told either who had made the contact with the tainted juror or what had been said to him:

> "Members of the Jury, we have had a little incident happen . . . One of the parties over the weekend contacted an acquaintance and asked him a question which required the acquaintance to ask a member of the jury for the answer, thus, of course, bringing to the attention of the juror the party who asked the question in the first place . . . It was an impropriety. It shouldn't have been done -- an irregularity . . . (A.637-38).

The effect of the trial judge's statement about the juror contact may be measured by the fact that the jury convicted Petitioner on the basis of wholly insufficient evidence. Petitioner has been sentenced to three years in prison.

REASONS FOR GRANTING WRIT

I.

THE JUROR CONTACT AND THE TRIAL JUDGE'S STATEMENT TO THE JURY CONCERNING THE CONTACT WERE PREJUDICIAL TO PETITIONER

The Court of Appeals concluded that t juror contact and the unfortunate statemen of the trial judge to the jurors were not of "sufficient import" to require a new tr (opinion p.13). The decision of the Court of Appeals is therefore in clear conflict with the decisions of this Court in Remmer v. United States, 347 U.S. 227 and 350 U.S 377 and Gold v. United States, 352 U.S. 985.

In Remmer II this Court held with respect to a friend's suggestion that a j "make a deal" with the defendant and the investigation of the juror's friend durin the trial:

> "He had been subjected to extraneous influences to which no juror should be subjected, for it is the law's objective to guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made. " 350 U.S. at 382.

In Gold v United States, an F. B. I. agent investigating another case made telephone and personal visits to the homes of three jurors. The trial judge discussed the incident with the entire jury and discharged two persons who felt disturbed by it. This Court held that the entire jury had been tainted because of the intrusion into their privacy. This Court also held:

> "The fact that the intrusion was unintentional does not remove the effect of the intrusion. "352 U.S.at 985.

The Court of Appeals completely disregarded the Remmer and Gold decisions in affirming Petitioner's conviction. Even a cursory analysis of Petitioner's case impels the conclusion that the Writ of Certiorari should be granted.

The trial judge's statement concerning the juror contact naturally aroused curiosity in the minds of the other jurors as to the substance of the communication with one of their number and suspicion as to the identity of the perpetrator of such an "irregularity" and "impropriety". The tainted juror couldn't satisfy their curiosity or allay their suspicions. He had pledged his silence to the trial judge. The other jurors were therefore left to their own devices to determine what had been done and who was the wrongdoer. The contact and the judge's statement were an intrusion into the privacy of the jury which interrupted and interfered with their consideration of the evidence and denied Petitioner a fair trial. As this Court said in Remmer v. United States, 347 U.S. 227, 229:

> "In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons,

> deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant."

The Prosecution hardly rebutted this presumption of prejudice. Indeed, if the trial judge had felt (as the Court of Appeals says he should have) that the juror contact was not of "sufficient import" to warrant a new trial, the judge would have told the other jurors what had been done and who had done it. But the trial judge recognized the prejudicial nature of the contact:

> THE COURT: Well, I am never going to (make) mention to the defendant; I can't. That would undoubtedly prejudice him. But I can, of course, explain it without going into the name of the juror, and, of course let the juror sit. (A.632)

We respectfully submit that the trial judge and the Court of Appeals have so far overlooked the fact that Petitioner was at least as prejudiced when the other jurors

were permitted to speculate whether he had offered one of their number a bribe (or done something else improper) as the perpetrator of the contact would have been had the trial judge told those jurors what was done and who had done it.

The fact is that a mistrial should have been granted. Instead the trial judge insisted on continuing with the trial without replacing the tainted juror and in his effort to avoid prejudice to the perpetrator of the juror contact the trial judge prejudiced Petitioner's right to a fair trial by tainting the other members of the jury.

CONCLUSION

The juror contact and the trial judge's statement to the jury concerning it were an intrusion into the privacy of the jury which interrupted and interfered with their consideration of the evidence. The trial judge erred in failing to grant a mistrial and in allowing the tainted juror to sit. This error was grievously

magnified when the trial judge failed to tell the other jurors that Petitioner was not guilty of the wrongdoing, and failed to even tell them the substance of the communication with the tainted juror thereby allowing the imagination of the other jurors to run wild and tainting them.

We respectfully urge this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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